BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	
Implementation of Section 224 of the Act	WC Docket No. 07-245
A National Broadband Plan for Our Future	GN Docket No. 09-51

COMMENTS OF CHARTER COMMUNICATIONS, INC.

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

Charter supports the Commission's proposal to establish a telecommunications pole attachment rate that is as close as possible to the fully compensatory cable rate. As currently interpreted, the existing "telecom rate" formula yields excessive rates and has deterred some companies from deploying advanced communications services, contrary to the goals of the Telecommunications Act of 1996. With the 1996 Telecommunications Act, Congress sought to ensure the widespread availability of new and advanced communications services on a competitive and timely basis, by eliminating barriers to facilities-based deployment. The Commission's proposal to lower the cost of providing telecommunications services will provide regulatory certainty and spur investment in broadband deployment, just as the Commission's significant 1998 decision to apply the cable rate to cable attachments intermingled with Internet Service encouraged cable systems to deploy innovative broadband and other advanced communications services.

As an integrated provider of video, data and voice services, with a majority rural subscriber base, Charter must weigh the impact of pole attachment fees in its investment and deployment decisions. The effect of pole attachment rates is particularly acute in rural areas, where attachers must attach to more poles to reach fewer customers. Application of the existing telecom rate is also a significant source of disputes for Charter. Charter is not only faced with consistent demands by pole owners in pole attachment agreement and rate negotiations to pay the telecom rate, when the telecom rate is clearly not applicable, but has also been involved in formal litigation over the issue. Defending against these unreasonable demands has caused Charter to incur significant attorneys' fees, deployment delays and waste other critical resources that could have been spent on deploying advanced services to consumers.

The Commission's proposal to modify the telecom rate formula by eliminating the capital components of the carrying charge and applying the higher of the reinterpreted telecom rate or the cable rate, will not only promote broadband deployment, but is also consistent with the Pole Attachment Act and cost causation principles. First, because the lowest rate that would ever apply under the Commission's approach is the fully-compensatory and widely-applied cable rate, the proposal is consistent with section 224(b)'s directive to ensure "just and reasonable rates." Second, the Commission's proposed reinterpretation of the ambiguous term "cost" in section 224(e) is a reasonable construction of the statute and thus entitled to deference. For example, the Commission is correct that even if capital costs are excluded from the calculation of the lower bound telecom formula pole owners nevertheless recover all the capital costs incurred as a result of "providing pole space" in the form of up-front make-ready charges, including for replacing old poles with new poles. Additionally, the Commission articulated various reasons to reinterpret the telecom rate, consistent with the public interest, including: removing barriers to broadband deployment, eliminating deployment distortions due to pole rate differentials, attaining technological neutrality and reducing disputes. Moreover, the Commission's original interpretation of the telecom formula envisioned multiple facilities' based competitive telecommunications providers (the more attachers on the pole the lower the telecom rate), that have not materialized. Third, because the Commission's approach merely requires the exclusion of the taxes, depreciation and rate of return components of the existing rate formula, the proposal is also simple and easy to administer.

Charter also supports the Commission's efforts to "improve" its enforcement regime. Eliminating the requirement to file access complaints within 30 days of an access denial, will give parties time to resolve access disputes informally without the need to file premature

complaints. The Commission's proposal to award compensatory damages for unlawful access denials will discourage pole owners from unreasonable access denials in the first instance. Allowing attachers to procure refunds further back than from the time the complaint was filed, will also help improve the enforcement regime and make broadband less expensive. Providing awards to compensate for the imposition of unjust and unreasonable rates, terms or conditions will also significantly inhibit unlawful pole owner behavior.

On the other hand, Charter does not believe that pre-complaint mediation should be mandatory. The existing mediation process does not seem to consider existing precedent or important public policies. Rather, in Charter's experience, the Commission's mediation process, although well-intentioned, is lengthy and often results in "split-the-baby" decisions that do not necessarily allow attachers to receive the full protections of the Pole Attachment Act. Mediating every case also results in a dearth of precedent, which, in Charter's experience, has led to regulatory uncertainty and disputes. In order to achieve better outcomes using the Commission's existing three-pleading complaint procedure (which has historically worked well), the Commission should instead adopt a timeframe for resolving disputes promptly and allow parties to seek pre-complaint mediation voluntarily.

While the Commission's proposals to reinterpret the telecom formula and reform its enforcement procedures will eliminate barriers to broadband deployment, the Commission's proposal to modify its long-standing "sign and sue" rule, will have the reverse effect. Modifying the rule to require attachers to notify a pole owner in writing of every, possible objectionable rate, term and condition prior to executing an agreement will undermine the very purpose of pole attachment regulation. The rule was established more than 30 years ago to ameliorate pole owners' superior bargaining position, which remains unchanged. The rule serves the same

important function today as when it was first established, and, for this reason, has repeatedly been upheld (as recently as 2002) by the courts as a reasonable exercise of the Commission's duty to guarantee effective pole attachment regulation.

The pole owners advocating modification or elimination of the rule have provided no evidence that attachers abuse the rule. In reality, the "sign and sue" rule is rarely invoked and encourages good faith negotiation. Under the current "sign and sue" rule, pole owners have the ability to demonstrate that an attacher bargained away the rate, term or condition that it subsequently challenges. In addition, and significantly Charter is concerned that the Commission's notice requirement will create a new class of disputes over what constitutes proper written notice. Even in the rare "sign and sue" case, the Commission will have to decide, as a threshold matter, whether the specific provision was properly set forth in the notice and, if not, whether the attacher could have reasonably anticipated that the challenged rate, term or condition would be applied or interpreted by the pole owner in the manner complained of.

Finally, there is also no evidence that attachers routinely make unpermitted attachments or that the Commission's existing five-year back rent penalty, which is charged at the current year's rental rate, plus interest, does not provide attachers with the needed incentive to follow permit processes. In addition to the five-year back rent penalty, Charter is also subject to strict default, indemnity, bond and insurance requirements in pole attachment agreements and at the state and local level.

Charter, one of Oregon's largest cable operators, also urges the Commission to reject Oregon's penalty regime. Charter's experience in Oregon demonstrates that the introduction of non-compensatory penalties creates perverse incentives for pole owners to abuse the pole attachment process in order to generate revenue. For example, when the Oregon Public Utility

Commission ("PUC") implemented its initial penalty regime ten years ago, the original penalty for unpermitted (i.e., unauthorized) attachments was $250 per pole or 20 times the annual rent, whichever was higher. This penalty created perverse incentives for pole owners to "discover" alleged unpermitted attachments and the Oregon PUC was eventually forced to drastically reduce the penalty (essentially to the Commission's existing penalty) in order to stem pole owner abuses in this regard. Likewise, in response to the higher of a $500 per pole or 60 times the annual rent penalty for having "no contract," pole owners jumped at the chance to cancel existing agreements and force "take-it-or-leave-it" contracts on attachers (including Charter), under the threat of sanctions. As a result, the Oregon PUC also severely limited pole owners' ability to apply that sanction by implementing a rule forbidding pole owners from cancelling a contract before a new one is in effect.

It is also important to emphasize that the regulations relating to "plans for correction" and "violations," mentioned by the Commission do not relate to unpermitted attachments. These provisions are part and parcel of Oregon's comprehensive inspection program, which is governed by an entirely separate set of Oregon PUC rules, as explained in Section V.B below. Complying with these rules is so time-consuming that many companies (attacher and pole owner alike) hire employees dedicated to dealing with the myriad requirements and disputes that arise under this program alone. In addition, without the constant oversight of a stakeholder organization known as the Oregon Joint Use Association, which was created by the Oregon state legislature to address certain joint-use issues, the Oregon PUC would be inundated with pole attachment complaints. Even with the OJUA's participation, the Oregon PUC dedicates a significant amount of manpower towards managing the program, including performing field inspections, monitoring plans of correction and addressing disputes arising from the program.

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COMMENTS OF CHARTER COMMUNICATIONS, INC.

I. INTRODUCTION

Charter Communications, Inc. ("Charter") hereby submits its Comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") released in the above-captioned proceeding.[1] Charter is the nation's fourth largest cable television operator, with approximately 5.3 million residential and business customers. Charter delivers a wide array of communications services, including "traditional" cable television service as well as broadband information and high-speed cable modem services to customers in 27 states across the nation. In addition to these services, Charter offers state-of-the-art services such as high definition video, video on demand and Internet-protocol ("IP") enabled communications services, including voice services. Since 2000, Charter has invested over $8 billion to rebuild its legacy analog plant and deploy broadband, competitive voice and advanced video services to its largely rural subscriber base.[2]

Charter has pole attachment relationships with thousands of utility pole owners nationwide. Charter has extensive experience with pole attachment rents, agreement

[1] The FNPRM was published in the Federal Register on July 15, 2010 (75 Fed. Reg. 41,361). An erratum to the FNPRM was published in the Federal Register on August 3, 2010. 75 Fed. Reg. 45,590.

[2] *See, e.g.*, Comments of Charter Communications, Inc., WC Docket No. 07-245, at 2-3, filed Mar. 7, 2008 (explaining that Charter's service areas are "majority rural" and that "[o]nly six of Charter's 384 headends serve more than 15,000 subscribers and pass even 100 homes per mile").

negotiations and the other pole attachment rates, terms and conditions attendant to the overall pole attachment process. Charter supports many of the Commission's proposals set forth in the FNPRM because they will allow Charter to deploy broadband facilities more rapidly and at reduced cost, which will benefit consumers. In particular, Charter supports the Commission's proposed reinterpretation of the telecom rate formula. The existing telecom rate formula results in excessive pole attachment fees, protracted disputes and creates barriers to broadband deployment. Charter also supports several of the Commission's proposed improvements to the enforcement process, which will discourage unlawful pole owner conduct. On the other hand, Charter is opposed to the Commission's proposed changes to the balanced "sign and sue" rule, which will undermine the Commission's objectives to speed the availability of affordable broadband. Charter also urges the Commission to reject the adoption of stricter penalties for unauthorized attachments. The current system more than adequately provides attachers with incentives to follow permit processes. Increased penalties will only result in unjustified windfalls to utilities, increasing the incidence of disputes, as well as the cost of broadband deployment.

II. THE COMMISSION'S PROPOSAL TO REINTERPRET THE TELECOM RATE FORMULA WILL PROMOTE BROADBAND DEPLOYMENT, REDUCE WASTEFUL DISPUTES AND IS CONSISTENT WITH PRINCIPLES OF COST CAUSATION AND APPLICABLE LAW

Charter supports the Commission's proposal to reinterpret section 224(e) to establish a "lower bound" telecommunications pole attachment rate by eliminating the capital cost components of the carrying charge (i.e., depreciation, taxes and rate of return).[3] The current "telecom rate" formula yields excessive rates that are significantly higher than the fully compensatory "cable rate" formula, deterring "a number of cable operators . . . from offering

[3] FNPRM ¶ 135.

new, advanced services"[4] and distorting investment and deployment decisions.[5] Reinterpreting the telecom rate formula so that it is "as low and close to uniform as possible"[6] with the fully compensatory cable rate, will not only remove barriers to broadband deployment and enhance competition, consistent with the recommendations in the National Broadband Plan, it will also reduce wasteful and time-consuming disputes over application of the telecom rate formula. As discussed below in Sections II.C and II.D, Charter also believes the Commission's reinterpretation of the telecom rate formula is authorized within the existing statutory framework of the Pole Attachment Act.

A. The Commission's Proposal To Reinterpret the Telecom Rate Formula Will Promote Broadband Deployment and Competition, While Eliminating Market Distortions

Ensuring just and reasonable rates for access to essential pole facilities is critical to the deployment of advanced communications services and competition.[7] Indeed, the 1978 Pole Attachment Act[8] was the legislative response to substantial evidence of abuse by monopoly pole-owning utilities, including the imposition of "exorbitant rental fees and other unfair terms" on cable operators.[9] Congress recognized that, without pole attachment regulation, "utilities by

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[4] FNPRM ¶ 116.

[5] FNPRM ¶ 115 (*citing* Omnibus Broadband Initiative, Federal Communications Commission, *Connecting America: The National Broadband Plan* at 110 (2010), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf (hereinafter "National Broadband Plan").

[6] FNPRM ¶ 115.

[7] *See, e.g.*, National Broadband Plan at 109 ("The cost of deploying a broadband network depends significantly on the costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands."); *see also Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, FCC 97-423, 13 FCC Rcd. 1034, 1045 (1998) ("Wireline video and telecommunications competition is heavily dependent on the ability of market participants to obtain access to utility poles, conduits and rights of way at reasonable rates.").

[8] Pub. L. No. 95-234, 92 Stat. 25 (1978), codified at 47 U.S.C. § 224.

[9] *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order On Reconsideration, FCC 01-170, 16 FCC Rcd. 12103 ¶ 21 (2001) (hereinafter "2001 FCC Pole Order") (*citing* S. Rep. No. 95-580 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109); *see also Alabama Cable Telecomm. Ass'n v. Alabama Power Co.*, DA 00-2078, 15 FCC Rcd. 17346 ¶ 6 n.27 (2000) ("By conferring jurisdiction on the Commission to regulate pole attachments, Congress

virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates."[10] With the Pole Attachment Act, Congress sought "to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers."[11] The cost-based, fully compensatory, easily applied cable rate formula contained in the 1978 Pole Attachment Act, as further interpreted and developed by the Commission, was one of the biggest factors in promoting the widespread deployment and development of advanced communications services by cable operators.

In 1996, Congress passed the Telecommunications Act of 1996 and directed the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by, among other means, "remov[ing] barriers to infrastructure investment."[12] The 1996 Act amended the Pole Attachment Act to expand the Commission's jurisdiction over poles and conduit to cover non-incumbent competitive local

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sought to constrain the ability of telephone and electric utilities to extract monopoly profits from cable television systems operators in need of pole space.").

[10] H.R. Rep. No. 94-1-1630 at 5 (1976). *See also Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, FCC 98-20, 13 FCC Rcd. 6777 ¶ 2 (1998) (hereinafter "1998 FCC Order"), *aff'd, NCTA v. Gulf Power Co.*, 534 U.S. 327, 330 (2002) (hereinafter "*Gulf Power*") (stating that cable companies have "found it convenient, and often essential, to lease space for their cables on telephone and electric utility poles . . . . Utilities, in turn, have found it convenient to charge monopoly rents."), *petition for review denied, Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002) (remarking that utilities often exploit market position to charge excessively high attachment rates and that to restrain this practice Congress sought a mechanism whereby unfair pole practices may come under review and sanction.).

[11] 1998 FCC Pole Order, 13 FCC Rcd. 6777 at ¶ 2.

[12] Telecommunications Act of 1996, Pub. L. No. 104-104, tit. 7, § 706(a), 110 Stat. 56, 153 (1996); 47 U.S.C. § 157 note.

exchange carriers ("CLECs"), in addition to cable systems, and included a rate formula for attachments "used by telecommunications carriers to provide telecommunications services."[13]

In contrast to the cable formula, the existing telecom formula allows utilities to directly allocate an equal portion of two-thirds of the unusable space costs to attachers among all attaching entities on the pole, including the pole owner (i.e., on a per capita basis), *in addition to* the 7.41% of pole costs (which already includes a proportionate share of unusable space costs) allocated to an attacher under the fully compensatory cable formula.[14] Because Congress assumed that at some point after the 1996 Act competitive telecommunications providers would thrive, Congress (and the Commission) expected the telecom rate to fall to approximately the same level as the cable rate (i.e., the more attachers on the pole the lower the rate under the telecom formula). Unfortunately, those predictions did not come to pass and telecom rates always far exceed cable rates. As a result, and as the Commission rightly acknowledges, application of the existing telecom rate has distorted deployment decisions (because the cost to deploy must account for whether the cable or telecom rate would apply) and deterred some broadband providers who pay the cable rate from offering certain services and expanding networks "based on the risk that, by doing so, a higher pole attachment rental rate might be applied for their entire network."[15]

Like other integrated providers of video, data and voice services, Charter must weigh the impact of pole attachment fees in its investment and deployment decisions. For example, although Charter (with rare exceptions) does not use its attachments to provide

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[13] 47 U.S.C. § 224(e)(1).

[14] *See, e.g.,* FNPRM ¶ 113 (explaining that the additional one-third of unusable space costs is allocated solely to the owner).

[15] FNPRM ¶ 115 (*citing* National Broadband Plan at 110-11). According to the record in this case, if the telecom rate were applied to all existing cable attachments, the cable industry's pole rental rates would rise from $208 million to $672 million. FNPRM ¶ 116 & n.317 (internal citations omitted).

"telecommunications services," as currently defined by federal law, given the uncertainty surrounding the classification of certain services, including IP-enabled voice services, and that the typical pole owner will seek the highest rate possible,[16] the potential application of the telecom rate is always a consideration before Charter deploys plant in states regulated by the Commission.[17] Application of the telecom rate to Charter's attachments is especially disadvantageous because Charter typically serves areas that are more rural and non-urbanized with fewer attachers (the lower the number of attaching entities, the higher the telecom rate). Moreover, because "there are often more poles per mile than households"[18] in rural communities, pole attachment rates already are a major factor in determining whether Charter should serve a particular rural area.[19]

Although Charter has encountered numerous problems as a result of the current telecom rate, the application of the cable rate to the vast majority of its attachments has allowed Charter to reach many more customers than if it were generally subject to the telecom rate. Indeed, the Commission's critical 1998 decision to apply the cable rate to cable television systems offering video and Internet service over the same attachments helped spur the widespread availability of

[16] For example, *see* Section II.B below regarding disputes involving Charter over applicability of the telecom rate. In addition, the telecom rate is highly volatile and easily manipulated. For instance, if a pole owner is able to improperly classify an urban area as rural (and use three attaching entities instead of five), the pole owner can inflate pole attachment fees by nearly 50%.

[17] *See* Comments of Charter Communications, Inc., WC Docket No. 07-245, at 5, filed Mar. 7, 2008 (hereinafter "Charter March 2008 Comments") (explaining that raising pole rents as the Commission originally proposed "will further degrade Charter's penetration rate expectations and thus deter broadband investment and deployment, particularly to rural communities"); *see also* Reply Comments of Charter Communications, Inc., WC Docket 09-154, at 3, filed Oct. 9, 2009 (explaining that "increases in pole rents for those services directly affects the willingness of firms to deploy or offer them") (internal citations omitted).

[18] National Broadband Plan at 110.

[19] *See* Charter March 2008 Comments at 1 (stating that applying the telecommunications rate in rural areas would be "especially acute," and explaining that "[p]ole rate increases would translate to a range of $4.95-$8.66 per Internet subscriber per month and $13.27-$23.23 per voice subscriber per month, wiping out entirely the consumer benefits of VOIP, sheltering ILECs from needed competition, and providing a windfall for electric utilities"). The National Broadband Plan also acknowledges that the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber-optic deployment. National Broadband Plan at 109.

advanced, innovative communications services to consumers, including VoIP and ever-faster Internet speeds, as the Commission accurately predicted:

> In specifying this rate, we intend to encourage cable operators to make Internet services available to their customers. We believe that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not serve the public interest. Rather, we believe that specifying the Section 224(d)(3) rate will encourage greater competition in the provision of Internet service and greater benefits to consumers.[20]

In contrast, facilities-based CLECs have not achieved the kind of success envisioned pursuant to the 1996 Act, due, at least in part, to, application of excessive telecom pole rental fees, which have been applied to 100 percent of CLEC plant since February 2001.[21]

For these reasons, the Commission's proposal to reinterpret the telecom rate formula so that it is lower and close to uniform with the cable rate will promote broadband deployment and competition, including in rural areas, consistent with Section 224, the procompetitive goals of the 1996 Telecommunications Act and the recommendations contained in the National Broadband Plan. Indeed, consumers (particularly those in rural areas) will be the ultimate beneficiary of the lower bound telecom rate.

B. The Commission's Proposal To Reinterpret The Telecom Rate Formula Will Significantly Reduce The Incidence Of Disputes Regarding the Applicability Of The Telecom Rate Formula

The Commission also correctly observed that "[t]here have been many disputes about the applicability of 'cable' or 'telecommunications' rates to broadband, voice over Internet protocol

[20] 1998 FCC Order, 13 FCC Rcd. 6777 ¶ 32. *See also* Charter March 2008 Comments at 2 ("Thanks to an integrated IP-enabled broadband technology, the same network that carries Charter's video can provide high-speed Internet access and competitive voice services without occupying more space or adding more burden to utility poles. The direct savings to consumers in discounted digital voice bills average $11.70 per month per customer across the industry.").

[21] The telecom rate first became applicable in February 2001 and was phased in over a five-year period (at a rate of 20% per year) in accordance with 47 U.S.C. § 224(e)(4).

and wireless services, among others."[22] Charter has been involved in a number of wasteful and time-consuming disputes over the applicability of the telecom rate, including "near constant" and costly litigation. Indeed, because the existing telecom rate almost always yields a significantly higher rate than the cable rate, some pole owners have no qualms about assessing the telecom rate in proposed pole attachment agreement negotiations, or suing to extract it, even when the telecom rate is clearly not applicable.

In one illustrative case, in November 2005, AmerenUE sued Charter in the Circuit Court of the County of St. Louis, Missouri.[23] AmerenUE alleged that it had the right to assess the telecom rate on all of Charter's attachments because Charter used its attachments to offer VoIP services, even though (a) cable IP-enabled voice services were not classified as a telecommunications service[24] and (b) Charter used only a limited number of attachments on AmerenUE's to provide actual "telecommunications service." Although the parties eventually settled, the dispute took more than two years to resolve, requiring Charter to incur significant attorneys' fees and personnel resources. Charter has also been involved in protracted disputes with several other pole owners making similar assertions; and, while these particular disputes did not result in litigation, Charter was forced to expend considerable monetary and managerial resources defending against these assertions.

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[22] FNPRM ¶ 115. *See also* National Broadband Plan at 110 ("The [telecom] rate structure is so arcane that, since the 1996 amendments to Section 224, there has been near-constant litigation about the applicability of 'cable' or 'telecommunications' rates to broadband, voice over Internet protocol and wireless services.").

[23] *Union Elec. Co. d/b/a AmerenUE v. Charter Commc'ns, Inc.*, Cause No. 05CC-005581 (Circuit Court, County of St. Louis, Missouri). In response, Charter filed a complaint at the Commission: *Charter Commc'ns, Inc. v. Union Elec. Co. d/b/a AmerenUE*, File No. EB-05-MD-030 (complaint filed Nov. 30, 2005; dismissed after settlement by order of the Enforcement Bureau on Jan. 9, 2008, DA 08-48, 23 FCC Rcd. 135).

[24] *See, e.g., Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, Report and Order and FNPRM, FCC 07-22, 22 FCC Rcd. 6927 ¶ 54 (2007) ("Since we have not decided whether interconnected VoIP services are telecommunications services or information services as those terms are defined in the Act, nor do we do so today, we analyze the issues addressed in this Order under our Title I ancillary jurisdiction to encompass both types of service.") (citations omitted).

In addition, Charter is consistently presented with new pole attachment agreements that include provisions requiring Charter to pay the telecom rate on attachments other than those used solely to provide cable services and/or those used to provide VoIP. As a result, Charter must engage in costly and time-consuming pole attachment negotiations (often lasting years) on issues that have either long-ago been resolved by the Commission (i.e., applying the cable rate to commingled cable and Internet attachments) or have yet to be resolved by the Commission (i.e., classifying VoIP).

In those rare instances where Charter is properly assessed the telecom rate, pole owners frequently attempt to manipulate certain elements of the formula in order to inflate the rate. These include:

- attempts to deflate the number of attaching entities;[25]
- attempts to classify urbanized service areas as rural in order to take advantage of the lower presumed number of attaching entities;
- attempts to "dilute" urbanized service areas with rural service areas;
- failures to include pole owner and municipal government attachments when calculating the average number of attaching entities; and
- the performance of limited and inaccurate surveys to attempt to rebut the Commission's presumptions for the number of attaching entities.

Even though the number of attaching entities will still need to be considered under the Commission's rate proposal to determine whether the lower bound telecom rate or cable rate is higher, chances are that the fully allocated cable rate will in most cases yield a higher rate.[26] Therefore, disputes over the proper calculation of the telecom rate formula in those instances when the telecom rate formula should apply, will also become less frequent.

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[25] *See, e.g., Teleport Commc'ns Atlanta, Inc. v. Georgia Power Co*., Order on Review, FC 02-270, 17 FCC Rcd. 19859 ¶¶ 13-20 (2002) (rejecting Georgia Power's computation of the average number of attaching entities).

[26] FNPRM ¶ 141 and Appendix A.

C. The Commission Has The Requisite Authority To Reinterpret The Telecom Rate Formula As Proposed, Within the Existing Statutory Framework

In the American Recovery and Reinvestment Act of 2009, Congress directed the Commission to develop a national broadband plan to ensure that every American has access to broadband capability.[27] Recognizing that pole owners are monopoly gate-keepers to the deployment of wireline broadband facilities, the National Broadband Plan recommended that the Commission "establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 . . . to promote broadband deployment."[28] While there may be several lawful approaches to achieve this objective, the Commission's proposal to establish a lower bound telecom rate and apply the higher of the rate yielded by the "low-end telecom rate" or the fully allocated cable rate, is a legally sound approach that falls within Section 224's statutory framework, promotes broadband deployment and is easily administrable.

1. The Commission's Telecom Rate Proposal Provides Pole Owners with Just and Reasonable Compensation, in Accordance with Section 224

The Commission's proposal to reinterpret the telecom rate so that it is lower and as close to uniform as possible with the cable rate is fully consistent with Section 224(b), which requires the Commission to provide for "just and reasonable" pole attachment rates.[29] Specifically, the Commission proposes to determine the telecom rate from a range of permissible rates – with the existing telecom formula at the high end and "an alternative application of the telecom rate formula based on cost causation principles at the lower end."[30] The Commission's proposal to apply the higher of the lower bound telecom rate or the fully allocated cable rate is a practical way of addressing the deficiencies of the existing telecom rate which currently leads to excessive

[27] *See* American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 115, § 6001(k)(2) (2009).
[28] National Broadband Plan at 109.
[29] 47 U.S.C. § 224(b)(1) (providing that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions that are just and reasonable").
[30] FNPRM ¶ 128.

and over-compensatory rates.[31] In any event, because the lowest possible rate that would ever apply under this approach would be the fully allocated cable rate and because the cable rate has "been in place for 31 years and is 'just and reasonable' and fully compensatory for utilities,"[32] the Commission's approach is fully consistent with Section 224(b)'s Congressional mandate to provide for "just and reasonable" pole attachment rates.[33] The Commission's approach also is consistent with the overwhelming majority of certified states that have rejected a telecom rate formula as over-compensatory.[34]

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[31] To this point, The National Cable and Telecommunications Association offers an economic study of the Commission's formulas for the upper and lower bound telecom rates, presenting a refined analysis of the range of rates that would most align with cost causation and cost allocation principles. The study confirms that the Commission's approach is just and reasonable, and produces rates that are near the top end of the range that is consistent with the requirements of Section 224. *See* Comments of National Cable & Telecommunications Association, filed August 16, 2010, in this FNRPM proceeding. Charter supports that analysis.

[32] National Broadband Plan at 110. *See also FCC v. Florida Power Corp.*, 480 U.S. 245, 253-54 (1987) (finding that it could not "seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory"); *see also Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002) ("Without such proof [of full capacity], any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation").

[33] *See also Gulf Power*, 534 U.S. at 336 (explaining that the rate formulas articulated in subsections (d) and (e) are "subsets of – but not limitations upon" the requirement of "just and reasonable" rates).

[34] *See, e.g., Consideration of Rules Governing Joint Use of Utility Facilities and Amending Joint-Use Regulations Adopted Under 3 AAC 52.900 – 3 AAC 52.940*, Order Adopting Regulations, 2002 Alas. PUC LEXIS 489 (Oct. 2, 2002) ("The CATV formula is reasonable and should be the default formula for calculating pole attachment rates. . . . We find that the formula provides the right balance given the significant power and control of the pole owner over its facilities. . . . . We believe it is fair to assign the unusable portion of the pole based on how the usable portion of the pole is assigned. . . ."); *Order Instituting Rulemaking on the Commission's Own Motion Into Competition of Local Exchange Service*, R.95-04-043, I.95-04-044, Decision 98-10-058, 1998 Cal. PUC LEXIS 879 at * 85 - 87 (Cal. PUC, Oct. 22, 1998) ("[W]e conclude that the rate prescribed [by the California statute] for cable television pole attachment should apply where a cable corporation uses its pole attachment to provide telecommunications services. By applying a consistent rate for use of cable attachments, including provision of telecommunications services, we will avoid protracted disputes over how particular attachments are being used . . . . Moreover, such an approach promotes the incentive for facilities-based local exchange competition through the expansion of cable services . . . . We conclude that the adoption of attachment rates based on the [FCC cable rate] formula provides reasonable compensation to the utility owner . . . ."); *Petition of the United Illuminating Company For A Declaratory Ruling Regarding Availability Of Cable Tariff Rate For Pole Attachments By Cable Systems Providing Telecommunications Services And Internet Access*, Docket No. 05-06-01, 2005 Conn. PUC LEXIS 295, at 5-6 (Dec. 14, 2005) ("[T]he Department concludes that the cost-based pole attachment tariff that applies to community antenna television systems applies to such systems whether or not they offer additional services . . . . Regarding the cost and cable subsidization issue, [the utility] has put forth the proposition that it seeks to apply the telecommunications cost-based formula to alleviate the burden on its ratepayers . . . . Notwithstanding the testimony of [the utility's] witness and [the utility's] many references to its need to alleviate the cost burden on its ratepayers . . . [the utility's] expert witness testified that there is no additional cost burden. Rather, the proposed new telecommunications attachment fee is merely a formula application or scheme . . . . [T]he Department is not persuaded that there are incremental real costs to [the utility] from a pure cable company wire that provides only cable services and a cable company wire that also provides internet and telecommunication services. Therefore,

2. The Mechanism The Commission Proposes To Achieve The Lower Bound Telecom Rate Is Also Consistent With Section 224

The mechanism the Commission proposes to achieve the lower bound telecom rate – namely to exclude the capital costs from the formula – also accords with sections 224(d) and 224(e). As the Commission recognized in the FNPRM,[35] the term "cost" is "ambiguous" in section 224(e). While section 224(e) specifies how "[a] utility shall apportion the cost of providing space on a pole," it does not mandate what those costs should be.[36] By contrast, in section 224(d), Congress specifically described the costs that may be recovered by a utility in the fully allocated cable rate, *i.e.*, "the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole."[37] Although the Commission originally interpreted the term "cost" in section 224(e) in the same way as it interpreted the defined costs in section 224(d), the Commission unquestionably has the authority to reinterpret the telecom rate in the reasonable manner proposed in the FNPRM, given the ambiguity in section 224(e). Indeed, the Supreme Court has ruled that where a statute is ambiguous with respect to a specific issue, an agency's interpretation will be upheld when that interpretation "is based on a permissible construction of the statute."[38] Charter believes that the Commission's proposal to reinterpret the term "cost" in

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there do not appear to be any real cost impacts to [the utility] as a result of . . . ruling" that the cable rate applies); *Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, regarding Pole Attachment Use and Safety (AR 506) & Rulemaking to Amend Rules in OAR 860, Division 028 Relating to Sanctions for Attachments to Utility Poles & Facilities (AR 510)*, Order No. 07-137, 2007 Ore. PUC LEXIS 115, at *10 (Apr. 10, 2007) ("[Pole owners], as well as Staff, urge the Commission to consider the telecommunications formula. These participants argue that the telecommunications rate formula better considers the impact of several occupants on a pole. However, the cable formula has been found to fairly compensate pole owners for use of space on the pole").

[35] FNPRM ¶ 131.

[36] Specifically, Section 224(e)(2) states: "A utility shall apportion the cost of providing space on a pole . . . other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities." Section 224(e)(3) states: "A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity."

[37] 47 U.S.C. § 224(d)(1).

[38] *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996;* Report and Order, FCC 03-235, 18 FCC Rcd. 19975 ¶ 25 (2003) ("Where statutory terms are ambiguous**,** the Commission has the discretion to interpret the terms in a reasonable manner.") (*citing Chevron USA, Inc. v. Natural Resources*

section 224(e) by excluding capital costs in order to establish a lower bound telecom rate is a "permissible construction" of the statute for a number of reasons.

First, the Commission is correct that, even if the capital costs were excluded from the calculation of the lower bound telecom formula, utilities would still recover all the capital costs incurred as a result of accommodating a pole attachment in the form of up-front make-ready payments,[39] including the full cost of pole change-outs.[40] For example, consistent with the Commission's "cost causer pays" rules[41] and Sections 224(h)-(i) of the Pole Attachment Act,[42] virtually every pole attachment agreement that Charter has ever signed requires Charter to pay for every conceivable cost associated with make-ready, including materials (e.g., new poles), labor, overhead, employee and contractor supervision and administrative costs. Similarly, Charter's pole attachment agreements always require Charter to reimburse the pole owners for any new, additional or increased taxes that result from Charter's attachments. In Charter's vast experience, it has not caused pole owners to incur capital costs on its behalf, as the Commission correctly observed.[43] In fact, as the Commission has recognized, the cable rate, along with

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Defense Council, 467 U.S. 837, 843 n.9 (1984)). As the Commission also explained, the word "cost" when "unadorned" gives rate-setting agencies "broad methodological leeway." FNPRM ¶ 131 n.352 (internal citations omitted).

[39] *See* FNPRM ¶ 135. *See also Florida Cable Telecomms. Ass'n v. Gulf Power Co.*, Initial Decision, FCC 07D-01, 22 FCC Rcd. 1997 ¶ 19 (2007) ("Such changes and rearrangements on poles are normal to accommodate new attachments. And Gulf Power is never out of pocket because when a cable operator needs make-ready work to accommodate an attachment, the attacher pays the costs.") (internal citations and subsequent history omitted).

[40] *See, e.g., Alabama Cable Telecomms. Ass'n v. Alabama Power Co*., Order, FCC 01-181, 16 FCC Rcd. 12209 ¶ 60 n.154 (2001) (hereinafter "*Alabama Power Co*.") ("If there is not adequate space on an existing pole for an attacher, the attacher is usually required to pay up front to replace the pole with a larger pole. . . . [A] utility could include an allocated portion of these costs in its annual rental rate, but most utilities prefer to recover up front, the full amount of make-ready or pole change out costs.").

[41] *See* 47 C.F.R. § 1.1416(b) (requiring benefiting parties to pay the cost of pole modifications).

[42] Generally, these sections require any entity that seeks access to a pole and/or a pole modification to pay for those costs, including reimbursements to existing attachers and the owner.

[43] *See* FNPRM ¶ 135 (explaining that "at most" attachers are responsible for "a *de minimis*" portion of capital costs not recovered in make-ready charges). Charter, like the Commission, is also skeptical about utility claims that pole owners routinely place taller poles "purely to accommodate possible telecommunications carrier[s] or cable attachers," (*id.* n.365), given the number of pole change-outs Charter itself has paid for over the last decade.

attacher funded make-ready upgrades, actually "increases" the value of utility plant.[44] Moreover, it is widely recognized that the provision of telecommunications services over a cable attachment places no additional burden on utility poles.[45]

Second, just as the U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's decision to reinterpret the vague term "attaching entity" in Section 224(e) as "entirely reasonable and thus deserving deference,"[46] the same is true of the Commission's instant proposal. In the *Southern Company* case, several pole owners challenged the Commission's decision to reinterpret the term "attaching entities" to include municipalities and pole owners.[47] Initially, the Commission had decided that only those municipalities and pole owners providing "telecommunications services" would be considered "attaching entities."[48] The D.C. Circuit explained that "this reversal does not render the new rule infirm. Rather, the issue is whether the agency furnished a reasoned explanation for its changed position."[49] The *Southern Company* court believed the Commission provided ample explanation for "reversing course," including that the "broader definition [of attaching entity] is . . . justified because it limits the financial burden on telecommunications providers and therefore encourages growth and competition in the industry."[50]

In the FNPRM, the Commission articulated a number of valid reasons to support reinterpreting the ambiguous term "cost" in section 224(e), including: removing barriers to

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[44] *Alabama Power Co.*, 16 FCC Rcd. 12209 ¶ 58 ("In instances where attachers pay the costs of a replacement pole, the attacher actually increases the utility's asset value and defers some of the costs of the physical plant the utility would otherwise be required to construct for its core service.").

[45] *See, e.g.*, 1998 FCC Pole Order, 13 FCC Rcd. 6777 ¶ 73 ("There is general consensus among cable operators and telecommunications carriers that the leasing and use of dark fiber by third parties places no additional spatial or physical requirements on the utility pole. . . . We agree . . . .").

[46] *Southern Co. Servs. Inc. v. FCC*, 313 F.3d 574, 579 (D.C. Cir. 2001).

[47] *Id*. at 580-81.

[48] 1998 FCC Pole Order, 13 FCC Rcd. 6777 ¶¶ 50-54.

[49] *Southern Co.*, 313 F.3d at 581 (*citing PSWF Corp. v. FCC*, 108 F.3d 354, 357 (D.C. Cir. 1997); *Greater Boston Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

[50] *Id.* at 581.

broadband deployment;[51] eliminating deployment distortions due to pole rate differentials;[52] technological neutrality;[53] as well as reducing the number of disputes relating to the applicability of the telecom rate.[54] Moreover, as discussed in Section II.A. above, the Commission's original interpretation of the telecom rate formula envisioned multiple facilities-based CLEC attachments, in addition to existing power, incumbent telephone and cable TV attachments, that have not materialized. Reinterpreting the telecom formula under these circumstances is not only justified, but necessary to achieve the broadband network deployment objectives set forth in the Telecommunications Act of 1996[55] and in the American Recovery and Reinvestment Act of 2009.[56]

Third, because the Commission's proposal merely requires the exclusion of the taxes, depreciation and rate of return from the calculation of the rate, the proposal is also "readily administrable, consistent with Congress' instruction to develop a regulatory framework [pursuant to the Pole Attachment Act] that may be applied in a 'simple and expeditious' manner with 'a minimum of staff, paperwork and procedures consistent with fair and efficient regulation.'"[57]

In sum, the Commission's proposal to reinterpret the term "cost" in section 224(e) to establish a lower bound telecom rate is legally justified and consistent with the existing statutory framework.

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[51] FNPRM ¶ 116.
[52] FNPRM ¶ 115.
[53] FNPRM ¶ 117.
[54] FNPRM ¶ 115.
[55] *See* 47 U.S.C. § 157 note (a) ("The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . methods that remove barriers to infrastructure investment."). Congress defined "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability . . . using any technology." 47 U.S.C. § 157 note (c).
[56] *See* American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 115, § 6001 (2009).
[57] FNPRM ¶ 141 (*citing* S. Rep. No. 95-580 at 21).

III. THE "SIGN AND SUE" RULE SHOULD BE RETAINED IN ITS CURRENT FORM TO ENSURE EFFECTIVE POLE ATTACHMENT REGULATION AND INCREASED BROADBAND DEPLOYMENT

While the Commission's proposal to reinterpret the telecom rate will promote broadband deployment, reduce the incidence of disputes and serve other important public policy goals, Charter is concerned that the Commission's proposal to revise the "sign and sue" rule, will have the reverse effect. Specifically, the Commission proposes to modify its "sign and sue" rule so that an attacher would be prohibited from filing a complaint over unjust and unreasonable rates, terms and conditions unless the attacher notifies the pole owner of each objectionable provision in writing.[58] An exception would apply if the attacher (1) can establish that the rate, term or condition was not unreasonable on its face, but only as applied or (2) "could not reasonably have anticipated that the challenged rate, term or condition would be applied or interpreted in such an unjust or unreasonable manner."[59] Charter urges the Commission to retain the current sign and sue rule to ensure effective pole attachment regulation and enhance broadband deployment. Modifying the rule will cause more (not fewer) disputes and protracted pole attachment agreement negotiations. Pole owners are more than adequately protected under the Commission's existing rule.

A. The "Sign and Sue" Rule Is A Critical Component of Effective Pole Attachment Regulation And Is Rarely Invoked

One of the most effective means the Commission has to ensure that utilities provide just and reasonable rates, terms and conditions, consistent with its statutory mandate, is the so called "sign and sue" rule. The rule was established more than 30 years ago to ameliorate the "superior bargaining position" held by monopoly pole owners and ensure that attachers receive the full protections of the Pole Attachment Act. The Commission recognized that "without authority to

[58] FNPRM ¶ 107.
[59] FNPRM at Appendix B, proposed revision to 47 C.F.R. § 1.1404(d).

alter unreasonable or unjust contractual rates, terms or conditions, the Commission would be powerless to act in accordance with its mandate."[60] The rule has been upheld by the courts (as recently as 2002) as "a reasonable exercise of the agency's duty under the statute to guarantee fair competition in the attachment market."[61] Because pole owners continue to have absolute monopoly control over essential pole facilities, and have the same incentives to abuse that control, the rule serves the same critical function today as when it was first established.

The rule is an appropriate check on utility abuse and, in any case, is rarely invoked.[62] Notwithstanding the utilities' unsupported allegations in this proceeding that attachers blind-side"[63] utilities with pole attachment complaints, attachers do not lie in wait to "cherry pick" contractual terms they wish to disavow.[64] The complaint process is too expensive, lengthy and unpredictable for such a strategy to be effective. In any event, under the current "sign and sue" rule, if a pole owner wishes to demonstrate that an attacher bargained away the rate, term or condition that it subsequently challenges in a complaint, it can do so under the existing regulatory regime.[65]

Indeed, pole owners have offered no evidence in this proceeding to demonstrate that the "sign and sue" rule has been used to "forestall or upset the utility's ability to enforce [any]

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[60] *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, FCC 78-594, 68 F.C.C.2d 1585 ¶ 16 (1978), *aff'd*, *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981).

[61] *Southern Co.*, 313 F.3d at 583-84.

[62] As far as Charter can determine, there were only two sign and sue complaint cases decided by the Commission over the past ten years: *Salsgiver Communications, Inc. v. North Pittsburgh Telephone Co.*, Memorandum Opinion and Order, DA 07-2150, 22 FCC Rcd. 9285 (2007) and *Marcus Cable Associates, L.P. v. Texas Utilities Electric Co.*, Order on Review, FCC 03-173, 18 FCC Rcd. 15932 (2003).

[63] FNPRM ¶ 108.

[64] *Id.* ¶ 106.

[65] *See Southern Co.*, 313 F.3d at 583 ("It is conceivable that in some circumstances, the utility may give a valuable concession in exchange for the provision the attacher subsequently challenges as unreasonable. . . . In that situation, the Commission could evaluate the reasonableness of the [agreement] provisions as a package, and these provisions would rise or fall together without undermining the statutory policy in favor of voluntary dispute resolution.") (quoting the Commission's brief with approval). *See also*, Section III.C., below, explaining that the current rules provide adequate protection for utilities.

agreement."[66] As was the case with the utilities in the 2002 *Southern Company* case (when the Commission last defended the sign and sue rule): "The utilities [in this proceeding] do not describe or explain under what circumstances . . . 'sign and sue' undermines reliance on private negotiation or when exactly it is unfair to the utilities."[67] Despite the Commission's proposal to modify the rule, the Commission itself acknowledges that "[t]he record [in this proceeding] does not demonstrate that the potential for utilities to exert such coercive pressure in pole attachment agreement negotiations is less significant today than when the Commission first adopted the sign and sue rule."[68]

In Charter's experience, the "sign and sue" rule is virtually the only leverage Charter has when negotiating contracts and is the primary reason pole owners negotiate in good faith.[69] Indeed, the Commission's "willingness to review contract provisions and the possibility of either revising an unlawful term or . . . rate" has served "as an impetus to utilities to negotiate in good faith with regard to terms and conditions of the agreement before they are presented to the Commission."[70] Modifying the rule as the Commission proposes, particularly when the record is void of any such need, will only enhance pole owners' ability to abuse their monopoly power during negotiations by making negotiations even more one-sided and onerous for attachers.

For these reasons, Charter urges the Commission to retain the existing "sign and sue" rule in order to ensure that pole attachment regulation continues on just and reasonable rates, terms and conditions. Limiting review to items memorialized at the time of negotiation would hamper the Commission's ability to fulfill its statutory obligation .

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[66] FNPRM ¶ 102 (citing comments filed by PacifiCorp *et al*. and Florida Power & Light *et al.*).
[67] *Southern Co.*, 313 F.3d at 583 (quoting the Commission's brief with approval).
[68] FNPRM ¶ 104.
[69] Attachers, on the other hand, have no choice but to "negotiate in good faith," or risk access denials and/or having their existing attachments removed from poles.
[70] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Report and Order, FCC 87-209, 2 FCC Rcd. 4387 ¶ 77 (1987).

B. A Formal Notice Requirement Will Cause Disputes, Drawn-Out Negotiations and Create Barriers to Broadband Deployment

Injecting an unnecessary, formal "notice" requirement into the pole attachment negotiation process will not only undermine effective pole attachment regulation, it will cause more disputes, prolonged and costly pole attachment agreement negotiations and complaint cases, and, at the same time, deter broadband deployment.

As demonstrated above, the Commission's "notice" proposal is not supported by the record and does not seem to consider the reality of pole attachment agreement negotiations. When Charter is presented with a proposed pole attachment agreement, Charter reviews the agreement and returns a counter-agreement, usually in redline form. Thereafter, the pole owner typically provides another draft, and, the parties eventually begin to negotiate. This process can take months and often, years. Nevertheless, there is no evidence in the record to suggest that this process is not working (particularly because the sign and sue rule provides attachers some leverage). Indeed, even though the typical pole owner agreement template includes dozens of unjust and unreasonable rates, terms and conditions at the outset, the parties eventually resolve their differences and execute the agreement without Commission interference, except in rare cases.

Charter is very concerned that requiring formal written notice will create a new class of disputes during negotiations over what constitutes proper written notice under the Commission's rule. Indeed, attachers will feel compelled to memorialize every conceivable basis for complaint, which will be time-consuming, expensive and (most likely) unnecessary. Pole owners, on the other hand, will use the notice requirement as additional leverage in the negotiations, *e.g.*, by

establishing formal notice procedures that effectively undermine the protections of the Pole Attachment Act.[71]

Similarly, even in the rare "sign and sue" case, the Commission will have to decide, as a threshold matter, whether the provision complained about was set forth in the notice, and, if not, whether the attacher could have reasonably "anticipated that the challenged rate, terms, or condition would be applied or interpreted in such an unjust and unreasonable manner."[72] These extra steps will not only "deter the pursuit of legitimate claims,"[73] they will undermine the Commission's goals in this proceeding to "improve[] [its] enforcement regime"[74] and "expedite dispute resolution" in accordance with the National Broadband Plan.[75]

Pole attachment agreement negotiations are already lengthy and contentious. Modifying the "sign and sue rule" will enhance pole owners' already considerable leverage during negotiations. In order to accelerate the negotiations process, reduce disputes and remove barriers to broadband deployment, the Commission should instead require pole owners to provide agreement templates free of facially illegal terms (i.e., those issues that are subject to controlling precedent).

C. The Existing Negotiation Regime Provides Adequate Protections For Utilities

As demonstrated above, there is no evidence in the record that attaching entities are abusing the complaint process and filing complaints over bargained-for terms they "would like to

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[71] For example, Charter is concerned that pole owners will include a provision in pole attachment agreements requiring the attacher to agree prior to execution that all objectionable rates, terms and conditions have been identified and shall not be used as a basis for complaint in the future. The Commission has found the prospect of similar "waivers" to be unjust and reasonable. *See, e.g.*, Letter to Mr. Danny Adams from Meredith J. Jones, Chief, Cable Services Bureau, dated January 17, 1997 ("We think it is contrary to the statutes for a party to be pressured, as s condition of an agreement, to waive all its legal rights and remedies provided under the law. Efforts to compel such waivers constitute impermissible attempts to subvert the Congressional intent underlying Section 224.").

[72] FNPRM at Appendix B, proposed revision to 47 C.F.R. § 1.1404(d).

[73] FNPRM ¶ 23.

[74] *Id.* ¶ 22.

[75] *Id.* ¶ 78 (*citing* National Broadband Plan at 112).

disavow."[76] The electric utilities urging revocation of sign and sue are large and extremely sophisticated corporations that hold virtually all of the cards during pole attachment agreement negotiations as a result of their absolute monopoly control over access to essential pole facilities. These utilities are well aware that, but for the sign and sue rule, attachers would have absolutely no leverage during negotiations. In any case, the current negotiation regime provides more than adequate protection for utilities.

First, if a pole owner engages in "good faith" negotiations and does not compel attachers to sign unjust and unreasonable agreements, the sign and sue rule is useless to the attacher. As the Court of Appeals for the D.C. Circuit explained when it upheld the sign and sue rule in the *Southern Company case*, "[i]f the rates and conditions to which the attacher later objects are within the statutory framework, then the utility has nothing to fear from the attacher's complaint. The attacher would not be entitled to relief."[77]

Second, the Commission's existing pre-complaint procedures already require complainants to summarize all steps taken to resolve problems prior to filing a complaint and/or demonstrate that further negotiations are fruitless.[78] The rules also require the complainant to provide an "affidavit" of all the factual allegations surrounding any complaint.[79] As a result, the Commission's existing rules essentially prohibit attachers from "blind siding" pole owners with unexpected complaints.

Third, if a pole owner wishes to demonstrate that an attacher bargained away the precise term or condition that it subsequently challenges in a complaint, it can do so under the existing

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[76] FNPRM ¶ 102 (*quoting* Reply Comments of Florida Power & Light *et al*.).
[77] *Southern Co.*, 313 F.3d at 583-84.
[78] 47 C.F.R. § 1.1404(k) (stating that "[t]he complaint shall include a brief summary of all steps taken to resolve the problem prior to filing. If no such steps were taken, the complaint shall state the reason(s) why it believed such steps were fruitless").
[79] 47 C.F.R. § 1.1404(l) (requiring "[f]actual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them").

regulatory regime. Indeed, in the FNPRM, the Commission affirmed that attachers do not have an "unfettered right to 'cherry pick' contractual terms they wish to disavow, while retaining the benefits of more favorable terms."[80] The Commission explained that in the event a utility gives a "valuable concession for the provision the attacher subsequently challenges as unreasonable . . . [t]he Commission will not disturb the bargained-for package of provisions."[81] Significantly, the Commission also noted that "[e]vidence of such a *quid pro quo* could come from several sources, including communications between the parties during contract negotiations,"[82] further demonstrating that existing rules are sufficient.

For the foregoing reasons, the proposed rule change is unnecessary and counter-productive to the Commission's important objectives in this case, including a stream-lined attachment process and increased deployment of broadband facilities. Instead, the Commission should retain the critical "sign and sue" rule in its current form.

IV. THE COMMISSION'S PROPOSED IMPROVEMENTS TO THE ENFORCEMENT PROCESS WILL CREATE NEEDED INCENTIVES FOR POLE OWNERS TO ACT IN A LAWFUL MANNER, MAKING IT EASIER AND LESS EXPENSIVE TO DEPLOY BROADBAND

Charter supports the Commission's efforts to "improve" the enforcement regime and modify its procedures for resolving pole attachment complaints, including "institut[ing] a better process for resolving access disputes," as recommended in the National Broadband Plan.[83] Charter agrees that the Commission's current complaint process can be ineffective in that it can take years to resolve a complaint, even though "time is often of the essence" with regard to pole attachments.[84] That said, while Charter agrees that informal dispute resolution can provide for a

[80] FNPRM ¶ 106.
[81] *Id*.
[82] *Id*. ¶ 106 & n.289.
[83] National Broadband Plan at 112.
[84] *Id*. at 112.

less costly and quicker resolution, Charter does not believe that informal dispute resolution should be a prerequisite to filing a complaint, beyond what is already required in the Commission's existing rules. Other modifications to the Commission's existing enforcement regime, such as allowing compensatory damages for access denials and imposing unjust and unreasonable terms and conditions, will provide incentives (that are currently absent) for utilities to provide timely access, follow existing rules and behave in a just and reasonable manner, as required by law and consistent with the Commission's goal to eliminate barriers to broadband deployment.

A. To Ensure Effective Regulation Of Pole Attachments The Commission Should Adopt A Time Limit for Resolving Disputes

Perhaps one of the biggest shortcomings with the Commission's existing pole attachment enforcement process is that the Commission is not required to resolve disputes within a specific time period. As a result, complaint cases can linger at the Commission for years, while the parties' dispute goes stale and is resolved in other ways (i.e., the attacher must often acquiesce to the unjust and unreasonable rate, term or condition, or, with regard to access, find another route and/or lose the customer). In other situations (including with regard to the applicability of the telecom rate), these delays have caused regulatory uncertainty in the communications market, significantly impacting every (not just the complainant's) cable operator's ability to deploy broadband.

The Commission's (essentially) mandatory pre-complaint mediation process also has certain shortcomings. First, since the mediation process is "informal" there are no timeframes governing the process. Second, the mediation process does not seem to consider existing precedent or important public policies. Rather, the current mediation process often results in "split the baby" decisions, in which parties are given little alternative but to compromise their

differences. These compromises typically do not allow attachers to receive the full protections of the Pole Attachment Act to which they are lawfully entitled. Third, the mediator's decisions "do not create precedents for what constitutes a 'just and reasonable' practice,"[85] which can lead to disputes over regulatory uncertainty. In any event, the current rules already require parties to seek informal resolution before filing a complaint, unless such efforts are fruitless.[86] Therefore, rather than develop a set of "best practices" governing informal pre-complaint dispute resolution, Charter urges the Commission to adopt a timeframe for resolving disputes promptly, i.e., in no more than 90-120 days and allow parties to choose whether to seek pre-complaint mediation.

B. Eliminating the Requirement to File Access Complaints Within 30 Days of Denial and Specifying Access Denial Remedies, Including Damages, Will Discourage Access Denials In The First Instance

In Charter's experience, situations involving the denial of access are often complex and fact-intensive, making it difficult to ascertain the precise date upon which the pole owner denied access. Moreover, the 30-day window is a short timeframe to resolve access disputes informally, while simultaneously drafting a complaint. The current 30 day rule also can put an attacher at a disadvantage in settlement discussions with the pole owner. In addition, as the Commission correctly observes, the 30 day rule often forces an attacher to file complaints "prematurely" in order to preserve its rights.[87] At the same time, eliminating the 30-day window will not prejudice pole owners because attachers have no incentive to delay filing an access denial complaint.

The Commission's proposal to codify available remedies for unlawful access denials, including an award of compensatory damages, will discourage pole owners from unreasonably

[85] National Broadband Plant at 112.
[86] 47 C.F.R. § 1.1404(k)
[87] FNPRM ¶ 82.

denying access in the first instance, as the Commission correctly observes.[88] These rule revisions are particularly critical given that pole owners often compete directly with attachers for the same customers, as the Commission also recognizes.[89]

C. Removing the Limitation on Receiving Refunds Back to the Date of The Complaint and Compensating Attachers Harmed by The Imposition of Unjust and Unreasonable Conduct Will Discourage Unlawful Behavior

The Commission's proposal to permit refunds "consistent with the applicable statute of limitations period,"[90] would also be a significant step forward in improving the Commission's enforcement regime and making broadband deployment less expensive. The existing refund rule provides no incentive for pole owners to charge just and reasonable rates because even when an attacher prevails in a complaint proceeding, the current remedy (a refund back to the day of the complaint) rarely makes the complainant whole. That said, Charter proposes that the refund reach back five years, or back to the date of the applicable statute of limitations, whichever is more, consistent with the current unauthorized attachment penalty. Pole owners already have enormous leverage over attachers and need no additional incentives to overcharge.

Charter also agrees with the Commission that attachers should not be limited to receiving refunds for overcharges. Awarding attachers compensatory damages when a rate, term or condition is found to be unlawful, as the Commission proposes, will significantly inhibit

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[88] *Id.*

[89] *Id.* Charter believes it is also important to point out that the Commission seems to have erroneously delegated to pole owners the unilateral right to determine "insufficient capacity" during access considerations. *See* FNPRM ¶ 67 (allowing pole owners to have the "final authority" to make judgments that relate directly to insufficient capacity and other access decisions) and proposed rule 47 C.F.R. § 1.1422(b)(2) (same). The Eleventh Circuit has already rejected this notion holding that such a delegation "is clearly not what Congress intended when it passed the Act." *Southern Co.*, 293 F.3d at 1347-48 ("[Utilities'] construction of the Act, which claims that the utilities enjoy the unfettered discretion to determine when capacity is insufficient, is not supported by the Act's text. . . . [Instead, capacity is sufficient "w]hen *it is agreed* that capacity is insufficient . . . ." (emphasis added). Consequently, the Commission should modify its proposed rule to reflect the requirement that attachers and utilities agree with regard to determinations of insufficient capacity.
rejecting "argu[ment] that the language [in section 224(f)(2)] permitting utilities to deny access on the basis of 'insufficient capacity' specifically entrusts utilities [] with the power to determine when capacity is insufficient").

[90] FNPRM ¶ 88.

unlawful behavior on the part of pole owners. Indeed, the Commission is correct that under the current regime the only consequence for imposing unjust and unreasonable conditions on an attacher is to remove or substitute the offending condition.[91] As a result, pole owners currently have little or no incentive to act lawfully, unless forced by the Commission.

In sum, modifying the Commission's current enforcement regime will incent pole owners to provide timely access, follow existing rules and behave in a just and reasonable manner, and, at the same time "speed the availability of broadband by making it easier and less expensive for telecommunications and cable companies to make use of existing infrastructure."[92]

V. THE COMMISSION SHOULD RETAIN EXISTING PENALTIES FOR UNAUTHORIZED ATTACHMENTS

The record in this case lacks substantiated evidence that attachers routinely make unauthorized and unsafe attachments.[93] Nor is there is any evidence that the existing five year back rent penalty, which is charged at the current year's rental rate amount, plus interest, does not provide the appropriate incentives for attachers to comply with the permit process. Charter is committed to safety and grid integrity because without a reliable, safe and secure system of poles and related facilities, Charter would not be able to serve its customers. Charter is also subject to strict default, indemnity, bond and insurance requirements in pole attachment agreements and at the state and local level. In short, Charter has no interest in making unpermitted or unsafe attachments. Adopting stricter penalties will only result in windfall profits for utilities, while diverting resources for broadband deployment and creating an acrimonious pole attachment

[91] 47 C.F.R. § 1.1410(a) and (b).
[92] FNPRM ¶ 20.
[93] *See, e.g.*, FNPRM ¶ 91 ("Based on the current record, we are unable to gauge with certainty the extent of the problem of unauthorized attachments. Indeed, the data suggest that the number of unauthorized attachments can vary dramatically from one pole system to another.").

environment. *See, e.g.,* Charter's description of the Oregon sanctions regime below, in Section VI.B.

A. Changing Existing Penalty Rules Would Merely Provide Pole Owners With Windfall Profits and Undermine The Commission's Broadband Deployment Objectives

Contrary to the unsupported and exaggerated claims of some utilities, who have an obvious pecuniary interest in generating revenue off their essential pole facilities (in the form of large, non-compensatory penalties), in Charter's experience (as is the experience with most attachers), the vast majority of so-called "unauthorized" attachments recorded by pole owners are the result of (1) lax or non-existent record-keeping on the part of pole owners;[94] (2) sloppy audits practices that generate incorrect information; (3) pole ownership changes;[95] (4) changes in the definition of "attachment," i.e., retroactively counting attachments (such as service drops) that did not require a permit when attached as an unauthorized attachment;[96] (5) monetary incentives offered by pole owners to contractors to find unpermitted attachments;" and (6) failures to notify attachers or allow them to participate in audits and verify audit results.[97] Moreover, because many utilities have audited their attacher plant several times over the last decade and begun to modernize their permitting processes, the incidence of unpermitted attachments will decline, particularly if the Commission adopts its comprehensive timeline.

Just as the utilities' unauthorized attachment claims are inflated, electric utility allegations regarding safety, when examined, are commonly proven to be false and/or vastly overblown, as is the case here. It is also important to point out that pole owners often put

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[94] FNPRM ¶ 90 n.248.

[95] *Id*.

[96] *Mile Hi Cable Partners, L.P. v. Public Serv. Co. of Colorado*, Order, FCC 02-95, 17 FCC Rcd. 6268 ¶ 12 (2002) (finding that "it would be unjust and unreasonable to allow [pole owner] to collect unauthorized attachment fees for drop poles when [pole owner] has provided no evidence to contradict [cable operator's] evidence that prior to 1998, [cable operator] was not required to apply for, or pay for, attachments to drop poles").

[97] Following many of these audits, Charter is merely presented with a large invoice for penalties, without any data supporting the pole owner's conclusions and making it impossible for Charter to verify the results.

attachers out of compliance, not the other way around.[98] The fact is that electric utilities have historically used attacher safety as a pretext to shift inspection and repair responsibilities (and correction costs) to attachers or to impose other discriminatory (e.g., applying heightened construction standards to attachers but not themselves) and other unreasonable requirements,[99] just as they are attempting in this proceeding.

For these reasons, there is no justification for adopting "stricter penalties." Pole owners currently have adequate remedies to ensure that attachments are permitted and safe, including the existing, compensatory five year back rent penalty (which has become the nation-wide standard), and the performance of routine audits and safety inspections. Adopting stricter penalties for a non-existent problem will only result in windfall profits for utilities, and at the same time, increase the incidence of disputes and the cost of broadband deployment.

B. The Oregon Penalty Regime Is Unworkable On A Nationwide Basis, Would Create Disputes And Divert Resources From Broadband Deployment

As discussed above, there is absolutely no basis in the record for adopting non-compensatory penalties, nor does Charter believe that Oregon's regime is appropriate or possible to implement on a nationwide scale. Charter is one of Oregon's largest cable operators and resides on approximately 150,000 poles in that state. Since the implementation of Oregon's complex, costly and burdensome inspection and sanction program in the year 2000, Charter (like

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[98] *See, e.g.*, Reply Comments of Comcast Corporation, WC Docket No. 07-245, at 25-26, filed Apr. 22, 2008 ("With Oncor and USS representatives present, a sample of poles that Oncor had demanded be replaced because of alleged cable operator safety violations was reviewed. At the conclusion of this joint review, it was found that Oncor had in fact caused all of the violations that necessitated the pole replacements for the sample of poles reviewed.") (*citing* Declaration of Michael Harrelson).

[99] *See, e.g.*, *Cable Television Ass'n of Georgia v. Georgia Power Co.*, DA 03-2613, 18 FCC Rcd. 16333 ¶¶ 11-12 (2003) (discounting Georgia Power's allegations regarding cable operator plant and stating that "Georgia Power contends that the terms and conditions of [Georgia Power's new pole attachment agreement] are warranted in light of the numerous violations of safety and prudent engineering procedures that the Cable Operators have committed. . . . While we emphatically share Georgia Power's concern about safety, the record does not support its assertions that the host of new contract provisions are necessary to preserve safe operations. Moreover . . . [Georgia Power's] exhibits relating to safety fall short of establishing a record of recent safety violations by the Cable Operators to justify the terms of the New Contract. *Indeed, Georgia Power cannot point definitively to a single incident of property damage or personal injury caused by one of the Cable Operators*.") (emphasis added).

all attachers and pole owners in the state) has struggled both with manpower and budgetary issues to keep up with the myriad requirements and penalties.

While it appears that the Commission is seeking comment on whether it should adopt Oregon's penalties for "unauthorized attachments," it is important to clarify that the term "unauthorized attachment" has historically been used by the Commission to mean an attachment without a permit.[100] In Oregon, the penalty for an "unpermitted" attachment is "[f]ive times the current annual fee per pole if the violation is reported by the occupant . . . and is accompanied by a permit application or is discovered through a joint inspection. . . ."[101] The only time a pole owner may lawfully assess the additional $100 is when the attacher "decline[s]" to participate in the audit.[102] While the additional $100 penalty may appear to provide an attacher with motivation to participate in audits, pole owners in Oregon, rarely (if ever), offer such an opportunity. In Charter's experience, pole owners make it physically impossible for an attacher to participate in audits because they hire contractors to audit attacher plant in several areas simultaneously. As a result, parties often dispute over whether imposing the additional $100 penalty is lawful.

It is also important to point out that when the Oregon PUC initially adopted its sanctions rules in 2000, the original penalty for unpermitted attachments was $250 per pole or 30 times back rent, whichever was higher.[103] As a result, pole owners were eager to "find" unauthorized attachments in order to generate revenue and the Oregon PUC was forced to drastically reduce

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[100] *See, e.g.*, *Mile Hi Cable Partners*, 17 FCC Rcd. 6268 n.4 ("Pole attachment contracts generally provide for an application process by which an attacher notifies a utility pole owner of the poles to which it wishes to attach. Unauthorized attachments are those attachments for which no application was filed.").

[101] Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, § 860-028-0140(2)(a), *available at* http://arcweb.sos.state.or.us/rules/OARS_800/OAR_860/860_028.html..

[102] OAR 860-028-0140(2)(b).

[103] *See* Oregon Public Utility Commission, *Adoption of Rules to Implement House Bill 2271, Sanction and Rental Reduction Provisions Related to Utility Pole Attachments*, AR-386, Order No. 00-467, Slip Op., Appendix A (Aug. 23, 2000).

the unpermitted attachment penalty in a 2007 rulemaking in order to stem pole owner "abuse" in this regard.[104]

The $500 sanction for "no contract" penalty referenced by the Commission also does not concern unauthorized attachments. Instead, because the Oregon PUC's rules require attachers to have an agreement,[105] the Oregon PUC adopted a rule for failure to have a contract. That said, when the penalty was first implemented in 2000, pole owners jumped at the chance to cancel their existing contracts and force "take-it-or-leave-it" templates on attachers under the threat of the sanctions.[106] Consequently, in the 2007 rulemaking, the Oregon PUC also severely limited a pole owner's ability to apply that sanction. Under the new rule, "the last effective contract between the parties . . . continue[s] in effect until a new contract between the parties goes into effect."[107] Therefore, the 'no contract' sanction essentially has no effect.

In short, the introduction of non-compensatory penalties into the Oregon pole attachment regime merely created an environment where pole owners attempted to game the system, rather than ensure permitted and compliant plant.

Additionally, the "correction of violations" and "plans for correction," mentioned by the Commission,[108] also are not related to unpermitted attachments, but to Oregon's comprehensive and costly inspection program, which is governed by an entirely separate set of Oregon PUC

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[104] *See Rulemaking to Amend and Adopt Rules in OAR 860, Divisions 024 and 028, Regarding Pole Attachment Use and Safety (AR 506) and Rulemaking to Amend Rules in OAR 860, Division 028 Relating to Sanctions for Attachments to Utility Poles and Facilities (AR 510)*, Order No. 07-137, 2007 Ore. PUC LEXIS 115, at *90 (Apr. 10, 2007) (revising OAR 860-028-0310(4) to limit unauthorized attachment penalties to more than five years back rent).

[105] OAR 860-028-0060(2).

[106] *See, e.g., Central Lincoln People's Util. Dist. v. Verizon Northwest*, UM 1087, Petition for Removal of Attachments (Ore. PUC filed May 22, 2003) (seeking an order for Verizon to pay $1,248 per pole in sanctions for "no contract" and the removal of Verizon's attachments). Charter itself was threatened with "no contract" sanctions of approximately $6.7 million and removal of its facilities by a pole owner eager to complete "negotiations" by a certain date and felt compelled to sign the contract. Over the years, Charter has had to fend off numerous attempts by Oregon utilities to impose unwarranted sanctions, forcing Charter to spend millions of dollars in unnecessary attorneys' fees and settlements.

[107] OAR 860-028-0060(4).

[108] FNPRM ¶ 95.

"Safety Standards."[109] Complying with these rules is a time-consuming and costly endeavor. Indeed, many companies (pole owner and attacher alike) have hired employees dedicated to dealing solely with Oregon's program, including the numerous conflicts that arise. For example, under the Division 24 Rules, all entities (including pole owners) are expected to inspect at least 10 percent of their plant on an annual basis[110] and repair discovered violations within two years of discovery, except in certain situations.[111] As a result, there is a constant stream of conflicting data sent between attachers and pole owners causing repeated inspections of the same plant and dozens of disputes, including over which entity caused a violation (including storm damaged plant), whether a particular "plan for correction" is adequate and whether sanctions are justified.

Without the constant oversight of the Oregon Joint Use Association ("OJUA"), which is a uniquely structured organization authorized by the Oregon state legislature,[112] to address issues arising from the program, the Oregon Public Utility Commission would be inundated with complaint cases. Even with the OJUA's participation, Oregon PUC staff must actively monitor the program by performing field inspections, monitoring plans of correction and addressing difficult disputes.

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[109] *See* Oregon Administrative Rules, Division 24, Safety Standards, § 860-024-011, *available at* http://arcweb.sos.state.or.us/rules/OARS_800/OAR_860/860_024.html.

[110] OAR 860-024-0011(1)(a)(A) (requiring "detailed inspections" of electric supply and communications facilities to occur at a maximum interval of 10 years with a "recommended inspection rate of ten percent of overhead facilities per year.").

[111] OAR 860-024-0012(2)-(3)(c) (allowing companies to defer repairs of violations that do not pose a foreseeable risk of danger to life or property for up to 10 years if all parties agree to the deferral. "If any affected operators do not agree to the plan, the correction of the violation(s) may not be deferred"). By contrast, the National Electric Safety Code requires that all violations (which, for the most part, are minor infractions, not involving worker or public safety) be kept on file until repaired. *See* NESC Rule 214(A)(4) ("Any defects affecting compliance with this code revealed by inspection or tests, if not promptly corrected, shall be recorded; such records shall be maintained until the defects are corrected.").

[112] *See* ORS § 757.290(1), note ("The Public Utility Commission shall establish a task force consisting of pole owners and utility pole users to advise the commission on policies and regulations for accommodating changes in the utility industries while maintaining safe and efficient utility poles, attachment installation practices and rights of way.") (referencing Section 9, chapter 832, Oregon Laws 1999).

In sum, Charter strongly urges the Commission to retain the status quo and reject Oregon's system. Although certain electric utilities uphold the Oregon "penalty regime" as a model of perfection (for obvious pecuniary reasons), the Oregon experience dictates against adopting Oregon's non-compensatory penalties and complex programs. Oregon's system is replete with opportunities for pole owner abuse; and, without constant involvement by the Commission to monitor an Oregon-like program, joint use in the 30 non-certified states would grind to a halt, along with broadband deployment.

IV. CONCLUSION

For the foregoing reasons, Charter fully supports the Commission's proposal to reinterpret the telecom formula and improve its enforcement regime. These changes will go a long way towards allowing Charter to deploy broadband in a more timely and cost-effective manner. On the other hand, in Charter's experience, revising the "sign and sue" rule and adopting stricter penalties, will have the reverse effect on broadband deployment.

Respectfully submitted,

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